UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TYRONE KEYS, Plaintiff/Counter-Defendant, v. BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN and the NFL PLAYER DISABILITY & NEUROCOGNITIVE BENEFIT PLAN, Defendants/Counter-Plaintiffs.	Case No. 8:18-cv-02098-CEH-JSS

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PROTECTIVE ORDER REGARDING DEFENDANTS' SUBPOENAS FOR PLAINTIFF'S BANK RECORDS

INTRODUCTION

Plaintiff Tyrone Keys has moved for a protective order (ECF 44, "Motion") to prevent Defendants Bert Bell/Pete Rozelle NFL Player Retirement Plan ("Retirement Plan") and NFL Player Disability & Neurocognitive Benefit Plan ("Disability Plan," and together the "Plans") from obtaining limited, third-party discovery from two financial institutions that hold or once held the Plans' funds. The Plans subpoenaed the financial institutions because Keys has refused to respond to the Plans' discovery requests,[1] making third-party discovery increasingly critical to establish whether Keys holds any funds or assets traceable to the Plans' prior overpayments, an inquiry essential to the Plans' counterclaims.

Keys was overpaid because he submitted fraudulent information. One of his defenses is the Plans cannot recover unless they can trace assets attributable to those overpayments. Pl.'s Ans. to Defs.' Countercls., ECF 40, at 6-7. He refuses to be deposed, and he now seeks to block the Plans from getting financial information from his banks. If his protective order is granted, the Plans will be unable to obtain the information they need.

The discovery is permissible under the Federal Rules, and Keys does not argue otherwise. *See* Fed. R. Civ. P. 26(b)(1) (permitting "discovery regarding any nonprivileged matter that is relevant to any party's claim…"). Instead, Keys contends the discovery is improper because the Court should limit evidence on the Plans' counterclaims to the administrative record. Keys also contends—for the first time ever—that discovery is unnecessary because the Plans have no right whatsoever to recover their prior overpayments since they have already terminated his monthly benefit payments.

[1] *See generally* Defs.' Mot. to Compel, ECF 42 (detailing Keys' responses to the Plans' discovery requests).

Keys has not shown that good cause justifies the issuance of a protective order. His objections to the Plans' third-party subpoenas are meritless. The Plans do not have to run their counterclaims through an administrative claims process before seeking relief from the Court, and the evidence relevant to those counterclaims is not found within or necessarily confined to the administrative record as Keys maintains.[2] Keys' newfound argument that the Plans have no right to recover should not prohibit the Plans' third-party discovery because (1) Keys did not raise this defense or move to dismiss the Plans' counterclaims on this basis; (2) even if Keys had joined his no-right-to-recover defense, the mere existence of that defense does not preclude discovery; and (3) Keys' argument contradicts the express terms of the Plans, and would effectively proscribe the Plans' ability to fully recover overpayments to the detriment of the Plans as a whole and their other, innocent participants.

By raising meritless arguments, Keys seeks to frustrate clearly permissible discovery and block the Plans from recovering amounts he received by fraud. As more fully explained below, Keys' motion should be denied.

BACKGROUND

In February 2018, the Plans retroactively reduced and then terminated Keys' disability benefits after determining he had defrauded the Plans by concealing his receipt of workers' compensation benefits and providing materially false and incomplete information to the Plans. Keys brought this case to overturn the Plans' decision.

The Plans timely answered Keys' Complaint and filed counterclaims. The counterclaims arise under section 502(a)(3) of the Employee Retirement Income Security Act ("ERISA") and

[2] *See* Defs.' Mot. to Compel, ECF 42, at 4, 6 (administrative record does not contain information relating to the Plans' counterclaims).

seek to recover nearly $1,000,000 in overpayments that Keys secured by virtue of his fraud. *See* Answer and Countercls., ECF 39, at 23-24, 31-32. Keys answered the Plans' counterclaims and asserted that the Plans did not identify a source of funds that are traceable to the funds overpaid by the Plans as one affirmative defense. Pl.'s Ans. to Defs.' Countercls., ECF 40, at 6-7.

On June 28, the Plans served Keys with a limited set of interrogatories and requests for production to elicit whether Keys has any funds or assets traceable to the Plans' overpayments. Keys answered the Plans' discovery requests on July 29 with blanket objections. (The Plans have since moved to compel discovery responses and depositions of Keys and his wife, Bessie Keys. *See* Mot. to Compel (ECF 42). That motion remains pending.)

On August 2, in compliance with Rule 45, the Plans notified Keys of their intent to serve two subpoenas on Suncoast Credit Union and Synchrony Bank, two financial institutions that currently hold or once held funds paid to Keys by the Plans. Decl. of Michael L. Junk, Ex. A (Letter from Junk to Dahl and Scriven dated Aug. 2, 2019). The subpoenas sought Keys' and his wife's monthly bank account statements, along with documents evidencing disbursements from the accounts and the recipients of such disbursements; deposit slips; and any other documents relating to deposits and withdrawals from Keys' and his wife Bessie Keys' accounts from 1992 (when Keys began receiving benefits from the Plans) to present.

Keys did not respond to the Plans' Rule 45 notice, and the Plans served the subpoenas on August 5. Decl. of Michael L. Junk, Ex. B. The Plans made the subpoenas returnable 15 days later (by August 20, 2019) given the impending September 6, 2019 discovery deadline.

On August 16—two weeks after the Plans notified Keys of their intent to serve the subpoenas, and just four days prior to the return date set for the subpoenas—Keys notified the

Plans of his forthcoming motion for protective order. Keys filed his motion on August 19. *See* Mot. for Protective Order Regarding Defs.' Subpoenas of Pl.'s Banking Records (ECF 44).[3]

STANDARD OF REVIEW

A protective order is warranted only if "good cause"—*i.e.*, "a sound basis or legitimate need to take judicial action"—justifies it. *See* Fed. R. Civ. P. 26(c)(1); *Auto-Owners Ins. Co. v. Se. Floating Docks, Inc*., 231 F.R.D. 426, 429–30 (M.D. Fla. 2005) ("The party seeking a protective order has the burden to demonstrate good cause, and must make 'a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements' supporting the need for a protective order."); *Russell v. City of Tampa, Fla*., No. 8:16-CV-912-T-30JSS, 2017 WL 2869518, at *2 (M.D. Fla. July 5, 2017) (M.J. Sneed). Keys has not shown that good causes exists for the Court to issue a protective order.

ARGUMENT

I. THE SUBPOENAS SEEK DOCUMENTS AND INFORMATION RELEVANT TO THE PLANS' COUNTERCLAIMS AND KEYS' AFFIRMATIVE DEFENSE.

The Plans are entitled to take discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). This broad right to discovery was recognized by the court in *Cornett v. Lender Processing Servs., Inc*., a case cited by Keys, Mot. (ECF 44) at 2-3, where the court noted that "[t]he term relevant is to be 'construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that bears on, any issue that is or may be in the case.'" *Cornett*, No. 3:12-CV-233-J- 32TEM, 2012 WL

[3] On August 20, the Plans received a cover letter and CD from Suncoast Credit Union in response to one of the two subpoenas. The Plans advised Keys of this production, and informed him that they would not review it until the Court resolved Plaintiff's motion for protective order. The Plans understand that Synchrony does not hold bank accounts for either Keys or his wife

5305990, at *2 (M.D. Fla. Oct. 29, 2012) (holding that financial records sought via third party subpoenas are discoverable).

The subpoenas are proper under Rule 26 because they seek documents and information relevant to the Plans' counterclaims and one of Keys' affirmative defenses. *See* Pl.'s Ans. to Defs.' Counterclaims (ECF 40) at 7 ¶ 5 (affirmative defense stating that the Plans "have not identified any fund that is traceable to the alleged overpayment.…").[4] Bank account statements and other documents relating to deposits and withdrawals from Keys' accounts will undoubtedly shed light on whether Keys still holds Plan funds and, if not, where the funds have gone. Notably, Keys does not contest the subpoenas on the grounds that Suncoast Credit Union and Synchrony Bank never held Plan funds.

Keys does not dispute that the discovery is material to claims and defenses joined in this case. *See Cornett*, 2012 WL 5305990, at *2 (noting that discovery is permissible on any matter that bears on, or that reasonably could lead to other matter that bears on, any issue that is or may be in the case). Indeed, traceability of Plan funds is critical to the Plans' ability to recover under the equitable theories advanced by their counterclaims. *See Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 656–58, 62 (2016) (equitable lien requires identification of traceable assets; expenditure of a fund on non-traceable items destroys the equitable lien); *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002) (a constructive trust is available "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession"); *Bd. of Trustees of Nat'l Elevator Indus. Health Benefit Plan v.*

[4] On July 31, 2019, during the meet-and-confer process preceding the Plans' motion to compel discovery (ECF 42), the Plans asked Keys to withdraw his affirmative defense relating to the existence of traceable assets, but he refused.

Goodspeed, 377 F. Supp. 3d 471, 473–74 (E.D. Pa. 2019) ("Because the Plan's claim is the existence of one or more specific funds against which an equitable lien could be attached…[t]he Court ordered bifurcated discovery, proceeding first on the issue of whether there is an appropriate fund for an equitable lien, assuming that Plaintiff had a meritorious claim.").

II. THE COURT'S CONSIDERATION OF THE PLANS' COUNTERCLAIMS IS NOT LIMITED TO THE ADMINISTRATIVE RECORD.

Keys' initial objection to the subpoenas rests on the premise that the Court should decide the merits of the Plans' counterclaims based solely on the administrative record. This objection is meritless for the same reasons outlined in the Plans' motion to compel. Defs.' Mot. to Compel, ECF 42, at 4, 6.

A participant's claim for benefits under section 502(a)(1)(B) of ERISA is reviewed for abuse of discretion on the administrative record before the plan administrator at the time of its decision. *See, e.g., Doyle v. Liberty Life Assur. Co. of Bos.*, 542 F.3d 1352, 1355–56 (11th Cir. 2008) ("where the administrator exercises discretion, deferential, (i.e., arbitrary and capricious) review is appropriate"). The rationale driving this rule is that courts should not assume the role of plan administrators, which are vested with plenary authority to determine claims for benefits. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989) ("when trustees are in existence, and capable of acting, a court of equity will not interfere to control them in the exercise of a discretion vested in them by the instrument under which they act") (citations omitted). That rationale has no place here.

The Plans' administrator determined that Keys was overpaid—and that decision was driven in large part by facts in and conclusions drawn from the administrative record—but the administrative record does not answer how much Keys was overpaid. The amount of the overpayment depends, for example, on the true amount of workers' compensation benefits Keys

received, something he affirmatively concealed from the Plans and thus shielded from the record. The administrative record also does not answer whether the Plans are now able to trace the overpaid funds to funds or assets in Keys' possession. The record is completely silent on this issue because it was not and could not have been addressed during the administrative process.[5]

It is disingenuous for Keys to maintain that all evidence on the Plans' overpayment claims should be limited to the existing administrative record. As explained in the Plans' motion to compel (Defs.' Mot. to Compel, ECF 42, at 4), courts routinely allow discovery related to overpayment claims brought under section 502(a)(3) of ERISA, like the Plans' claims here, noting that the evidence in such cases is not confined to the administrative record. *See, e.g., Jensen v. Solvay Chemicals, Inc*., 520 F. Supp. 2d 1349, 1355 (D. Wyo. 2007) ("Case law does not constrain discovery under ERISA § 502(a)(3) actions.") (citing *Hall v. Unum Life Insurance Co. of America*, 300 F.3d 1197 (10th Cir.2002)). Moreover, there is no requirement that the Plans exhaust administrative remedies prior to bringing claims for reimbursement, as Keys seems to contend. *See, e.g., Reliance Standard Life Ins., Co. v. Smith*, No. 3:05-cv-467, 2006 WL 2993054, *3 (E.D. Tenn. Oct. 18, 2006) ("As Reliance is not a beneficiary/participant under the plan, it is not required to exhaust any administrative procedures on the overpayment claim.").

III. THE TERMS OF THE PLANS AUTHORIZE THE BOARD TO BRING THE COUNTERCLAIMS.

The governing documents give the Plans the power to "[r]ecover any overpayment of benefits through reduction or offset of future benefit payments ***or*** other method chosen by the" Plan administrators. Retirement Plan Doc. § 8.2(o); Disability Plan Doc. § 9.2(o). For the first time anywhere, Keys argues in this motion that this provision does not authorize the Plans'

[5] In fact, the Plan administrator expressly reserved its right to take future actions to recover the Plans' overpayments. Decl. of Michael L. Junk, Ex. C, at 1 ("The Retirement Board made no decision on whether it should take additional steps to recover the overpayment to you. The Retirement Board reserves all rights in that regard.").

counterclaims now that the Plans have suspended Keys' disability benefits to partially offset the prior overpayments. In essence, Keys argues that the Plans can offset benefits but cannot combine that step with other action, even if multiple steps are required, as here, to recover all Plan overpayments.

This argument is baseless. But even if the argument had any merit, it does not foreclose the discovery sought by the Plans' subpoenas.

A. Keys Never Raised This Purported Defense.

The Court should not consider Keys' argument about the Plans' ability to recover overpayments because Keys never raised the issue as a defense to the Plans' counterclaims. If the governing Plan documents preclude the Plans from bringing counterclaims, as Keys argues, he should have pursued a 12(b)(6) motion to preempt the claims. Instead of moving to dismiss, Keys answered the counterclaims. Pl.'s Answer to Defs. Counterclaims, ECF 40. Because the counterclaims remain part of this case, the Plans are entitled to discovery under Rule 26. *See Cornett*, 2012 WL 5305990, at *2 (noting that discovery is permissible on any matter that bears on, or that reasonably could lead to other matter that bears on, any issue that is or may be in the case).

B. Keys' New Defense Does Not Defeat the Plans' Right to Discovery In Any Event.

Keys' argument that the Plans have no right to assert counterclaims is an affirmative defense because it would "require[] judgment for [Keys] even if the [Plans] can prove [their] case by a preponderance of the evidence." *Mandujano v. Freight Handlers, Inc.*, No. 8:17-CV- 479-T-30TBM, 2017 WL 2634967, at *1 (M.D. Fla. June 19, 2017) (citing *Wright v. Southland Corp.*, 187 F.3d 1287, 1303 (11th Cir.1999)); *see also Am. Auto. Ins. Co. v. Quality Plastering & Stucco, Inc.*, No. 611CV1767ORL22DAB, 2013 WL 12149411, at *2 (M.D. Fla. June 26,

2013) ("Rule 8(c) lists eighteen common affirmative defenses; however this list is not intended to be exhaustive, and other affirmative defenses may be available."). As an affirmative defense, Keys waived the issue by not stating it in response to the Plans' counterclaims.[6] *See Quinones v. United States*, No. 8:14-CV-164-T-36MAP, 2015 WL 3948420, at *6 (M.D. Fla. June 29, 2015) (J. Honeywell) ("failure to plead an affirmative defense generally results in a waiver of that defense") (citing *Latimer v. Roaring Toyz, Inc*., 601 F.3d 1224, 1239 (11th Cir. 2010)).

Even if Keys could resurrect the defense now, the mere existence of an affirmative defense does not foreclose discovery on issues joined in the case. If Keys believed the Plans' counterclaims were barred by another affirmative defense, such as the statute of limitations for example, the litigation (and relevant discovery) would typically go forward, and Keys would present his defense for the Court's consideration at the dispositive motions stage. Keys' newfound defense to the Plans' counterclaims should not give him greater standing to object to discovery than any other affirmative defense.

C. Keys' Argument Contradicts The Express Terms Of The Plans.

Keys' argument that the governing Plan documents prohibit the Plans' counterclaims is at odds with the express terms of the Plans. The documents give the Plans the power to "[r]ecover any overpayment of benefits through reduction or offset of future benefit payments or other method chosen by the" Plan administrators. Retirement Plan Doc. § 8.2(o); Disability Plan Doc. § 9.2(o). The plain intent of this expansive provision is to give the Plan administrators the broadest possible power and authority to recover overpayments of Plan assets, which the Plans' fiduciaries are duty-bound to preserve for the benefit of all Plan participants. *See* 29 U.S.C. § 1001(b); *see also Plumbers & Steamfitters Local No. 150 Pension Fund v. Vertex Const. Co.*,

[6] On August 27, 2019, Keys filed a motion for leave to amend his answer to the Plans' counterclaims (ECF 46). In that motion and attached proposed amended answer, Keys admits that his argument constitutes an affirmative defense. Mot. for Leave to File First Am. Answer, ECF 46, at 2; Ex. A to Mot., ECF 46, at 8-10. The Plans will oppose the motion.

932 F.2d 1443, 1450 (11th Cir. 1991) ("one of the fundamental common law duties of a trustee is to preserve and maintain trust assets," which requires the trustees to "discover the location of the trust property and to take control of it") (citations omitted).

The Plan administrators have discretionary authority to "interpret, control, implement, and manage the Plan," including authority to define and construe the terms of the Plan, and reconcile any inconsistencies in the Plan. Retirement Plan Doc. § 8.2. If there is any question about the breadth of the Plans' overpayment provisions, the Court should defer to the Plan administrators' view that the provision permits the Plans to recover overpayments through both a reduction of future benefits together with any other method necessary to accomplish the purpose of the provision. *See Conkright v. Frommert*, 559 U.S. 506, 512 (2010) ("If the trust documents give the trustee power to construe disputed or doubtful terms, the trustee's interpretation will not be disturbed if reasonable.") (citations omitted); *see also Blue Heron Beach Resort Developer, LLC v. Branch Banking & Tr. Co.*, No. 6:13-CV-372- ORL-36, 2014 WL 2625255, at *7 (M.D. Fla. June 12, 2014) (while "the word 'or' is a disjunctive participle. . . there are of course familiar instances in which the conjunctive 'or' is held equivalent to the copulative conjunction 'and,' and such meaning is often given the meaning 'or' in order to effectuate the intention of the parties as to a written instrument. . . .").

Keys' argument that the Plans must choose to offset future benefits to the exclusion of any other remedy, or vice versa, would lead to absurd results. If the Plans chose to offset Keys' future benefits, the Plans would never fully recover because Keys' future disability benefits are expected to be far less than the overpayment. If the Plans chose instead to recover through means that do not include offset, the Plans would have continued (over)paying Keys disability benefits each month even though Keys had already received approximately $1,000,000 in overpayments. The Plans should not have to make this binary Hobson's choice.

Nothing justifies stripping the Plans of their right to seek full recovery of all overpayments, and Keys' interpretation is hostile to both the purpose of the document (to allow the Plans to recover overpayments) and ERISA (to protect the interests of participants and beneficiaries). *See* Retirement Plan Doc. § 8.2(o) (recovery of overpayments); 29 U.S.C. § 1001(b) (a purpose of ERISA is the protection of the interests of participants and beneficiaries). The Plans should be able to choose a method that includes offsetting future benefits and equitable remedies until the Plans fully recover on account of the overpayment. *See, e.g., Feaz v. Wells Fargo Bank, N.A.*, 745 F.3d 1098, 1104 (11th Cir. 2014) (In interpreting a contract, a court "read[s] the words of a contract in the context of the entire contract and construe[es] the contract to effectuate the parties' intent."). That is what the Plans are doing in this case.

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CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiff's motion for a protective order.

Dated: August 29, 2019

By:

/s/ Michael L. Junk

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